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Borneo Wealth Sdn Bhd v Ratna Seri Arif & Ors

B HIGH COURT (KOTA KINABALU) — SUIT NO BKI-22NCvC-3/1 OF 2015
ISMAIL BRAHIM JC
28 AUGUST 2017

C *Civil Procedure — Trial — Preliminary issue — Defendants applied for some issues to be determined as preliminary issues under O 33 r 2 of the Rules of Court 2012 — Whether plaintiff able to or had standing to sue for loss and damage be determined before trial of matter — Whether plaintiff as company able to use and enjoy open public places be determined before trial of matter*

D

The first, second, fifth and sixth defendants filed an application for some issues in the present case to be determined as preliminary issues under O 33 r 2 of the Rules of Court 2012 ('the ROC') premised on the grounds that the
E determination of the issues to be tried in favor of the defendants would conclude the plaintiff's action against the defendants and there would be no necessity to try the other issues in the plaintiff's action herein. The plaintiff was a registered owner of a piece of land that was being developed into a 13 storey condominium while the defendants were the registered owners of land adjacent
F to plaintiff's land. The dispute between the parties arose in respect of a designated open space separating the plaintiff's land and the properties belonging to the defendants. The plaintiff had claimed that the defendants had wrongfully erected permanent structure on the said open space thus it sought for an order for the defendants to remove and demolish the encroachments and
G obstructions on the open space and also for damages. The issues to be determined by the court were: (a) the plaintiff as a company was able to use and enjoy open public places be determined before trial of the matter; and (b) the plaintiff is able to or has standing to sue for loss and damage for allegedly being deprived of the use and enjoyment of open public places be determined before
H the trial of this matter.

Held, dismissing the notice of application with costs of RM1,500:

(1) Section 38(1) of the Local Government Ordinance 1961 ('the LGO') does not preclude the inhabitants to take legal action in their own right,
I or in the present case the plaintiff as had it common rights over the open space as endorsed in its land title. The issue of whether it had a case that was founded on the tort of public/private nuisance or trespass would be a matter to be decided in the trial and be determined based on extrinsic evidence (see para 35).

(2) An open space may not necessarily refers to places that can only be used for activities through physical usage such as walking through or sitting in such places. The open space endorsed on a land title may also be used as 'green lung' area or may be reserved for other uses as may be determined by the relevant authority. In such a case where the open space is reserved as a 'green lung' area or for the road reserve in a particular area, a company would be entitles to use and enjoy the open space or open public place (see paras 36–37).

(3) The provisions of s 38 of the LGO were only intended to spell out the general authority over care and control of public place by the authority. Hence, even if the open space in the present case fell within 'open public place', it was still subject to the terms and conditions of the open space at the time the general authority and care was vested with the local authority (see para 37).

[Bahasa Malaysia summary

Defendan pertama, kelima dan keenam telah memfailkan permohonan untuk beberapa isu dalam kes ini untuk dipertimbangkan sebagai isu-isu permulaan di bawah A 33 k 2 Kaedah-Kaedah Mahkamah 2012 ('KKM') berdasarkan alasan bahawa pertimbangan isu-isu untuk dibicarakan bagi memihak defendan-defendan akan memutuskan tindakan plaintif terhadap defendan-defendan dan tiada keperluan untuk perbicaraan isu-isu lain dalam tindakan plaintif dalam kes ini. Plaintif merupakan pemilik berdaftar sebidang tanah yang dimajukan ke kondominium bertingkat tiga belas dan defendan-defendan merupakan pemilik berdaftar tanah bersebelahan dengan tanah plaintif. Pertikaian antara dua pihak timbul berkenaan dengan ruang terbuka yang ditandakan yang memisahkan tanah plaintif dan hartanah kepunyaan defendan-defendan. Plaintif menuntut bahawa defendan-defendan telah secara salah membina binaan kekal di atas ruang terbuka tersebut, oleh itu plaintif memohon satu perintah untuk defendan-defendan memindahkan dan merobohkan pencerobohan dan halangan atas ruang terbuka dan juga untuk ganti rugi. Isu-isu untuk dipertimbangkan oleh mahkamah adalah: (a) isu sama ada plaintif sebagai sebuah syarikat boleh mengguna dan menikmati ruang terbuka awam untuk ditentukan sebelum perbicaraan; dan (b) isu sama ada plaintif boleh atau mempunyai kedudukan untuk menyaman untuk kehilangan dan ganti rugi kerana dinafikan penggunaan dan nikmat manfaat ruang terbuka perlu ditentukan sebelum perbicaraan.

Diputuskan, menolak notis permohonan dengan kos sebanyak RM1,500:

(1) Seksyen 38(1) Ordinan Kerajaan Tempatan 1961 ('Ordinan tersebut') tidak menghalang penduduk untuk mengambil tindakan undang-undang dalam hak mereka sendiri, atau dalam kes ini plaintif kerana plaintif mempunyai hak bersama untuk ruang terbuka seperti

yang diendorskan dalam hakmilik tanah. Isu sama ada plaintif mempunyai kes berasaskan tort kacau ganggu awam/peribadi atau pencerobohan merupakan perkara yang akan ditentukan dalam perbicaraan dan akan dipertimbangkan berdasarkan bukti ekstrinsik (lihat perenggan 35).

(2) Satu ruang terbuka tidak semestinya merujuk kepada tempat yang hanya boleh digunakan untuk aktiviti melalui penggunaan fizikal seperti berjalan melalui atau duduk di tempat tersebut. Ruang terbuka yang diendorskan dalam hakmilik tanah juga boleh digunakan sebagai kawasan 'green lung' atau boleh dirizabkan untuk kegunaan lain seperti yang ditentukan oleh pihak berkuasa relevan. Dalam kes di mana ruang terbuka dirizabkan sebagai kawasan 'green lung' atau untuk jalan rizab dalam kawasan tertentu, sebuah syarikat akan mempunyai hak untuk mengguna dan menikmati ruang terbuka atau ruang terbuka awam (lihat perenggan 36–37).

(3) Peruntukan s 38 Ordinan tersebut hanya berniat untuk memperuntukkan kuasa am untuk jagaan dan kawalan kawasan am oleh pihak berkuasa. Oleh itu, walaupun ruang terbuka dalam kes ini berada dalam skop 'ruang terbuka awam', ruang tersebut masih tertakluk kepada terma dan syarat untuk ruang terbuka pada masa kuasa am dan penjagaan diletakkan dalam bidang kuasa pihak berkuasa tempatan (lihat perenggan 37).]

Notes

For cases on preliminary issue, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 10930–10947.

Cases referred to

Boyce v Paddington Borough Council [1903] 1 Ch 109, Ch D (refd)
Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor & Another Case [2009] MLJU 1858; [2012] 1 LNS 896, HC (refd)
HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1956] 3 All ER 624; [1957] 1 QB 159, CA (refd)
Lennard's Carrying Company, Limited v Asiatic Petroleum Company, Limited [1915] AC 705, HL (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 3
Local Government Ordinance 1961 ss 2, 38, 38(1)
Rules of Court 2012 O 33 r 2
Sabah Land Ordinance (Cap 68) s 28(1)

Norbert Yapp (Eow Yi Pei with him) (Norbert Yapp & Assoc) for the plaintiff.
Chung Jiun Dau (Chung & Assoc) for the first, second, fifth and sixth defendants.

Ismail Brahim JC:

[1] This is an application filed by the first, second, fifth and the sixth defendant ('the defendants') for the following issues to be determined/tried as preliminary issues under O 33 r 2 of the Rules of Court 2012 ('the ROC'). The application was premised on the grounds that the determination of these issues in favor of the defendants would conclude the plaintiff's action against the defendants and there would be no necessity to try the other issues in the plaintiff's action herein.

[2] The issues are as follows:

(a) that the issue whether the plaintiff as a company is able to use and enjoy open public places be determined before the trial of this matter; and

(b) that the issue whether the plaintiff is able to or has standing to sue for loss and damage for allegedly being deprived of the use and enjoyment of open public places be determined before the trial of this matter.

[3] From the issues that are proposed to be determined the central question that needs to be addressed by the court is on the locus standi/standing of the plaintiff to sue the defendants and the plaintiff being a company and not a natural person is able to use and enjoy open public places.

[4] Based on the issues above, it was contended that if both the answers to these issues are in the negative ie the plaintiff as company cannot enjoy or use open public place and the authority over the said place lies with the local government authority then the plaintiff's case would have no basis and there would be no necessity for a trial of the action save for the defendants' counterclaim. It was also submitted that the disposal of these issues would save time and expenditure.

[5] With the brief introduction of the matter before this court, I turn now to the facts of the case. In this case the plaintiff is a registered owner of a piece of land in Signal Hill Kota Kinabalu. Currently, the plaintiff's land is being developed into a 13 storey condominium. The defendants in this case are the registered owners of land adjacent to the plaintiff's land. The dispute between the parties arose in respect of a designated open space separating the plaintiff's land and the properties belonging to the defendants. In the statement of claim, the plaintiff avers that the open space which is endorsed on the all the documents of titles of the parties are meant for the benefit, use and enjoyment of all the adjoining land owners and inhabitants of the area. In the alternative

A it was averred that the plaintiff as a ratepayer, user and inhabitant of the said area has the common right to the designated open space within the meaning of s 38 of the Local Government Ordinance 1961 ('the LGO').

B **[6]** It was further averred in this case the defendants have disturbed and interfered with the plaintiff's rights of use and the enjoyment of the open space by wrongfully erecting permanent structure on the said open space. It was averred that the defendants have put up structures like garages, 'pondok' and gate on the said open space.

C

[7] Based on the above actions of the defendants, in the present claim the plaintiff seeks for an order that the defendants remove and demolish the encroachments and obstructions on the open space and also for damages.

D **[8]** In the statement of defence, the relevant averments as regards to the issue in this application can be found at para 6, where the defendants aver that whilst open spaces are for the benefit and enjoyment of inhabitants of the area and they are not necessarily for the benefit and enjoyment of the registered landowner. At para 9 it was averred that some of the structures complained by
E the plaintiff were erected more than 30 years ago and all these while there were no complaints by the inhabitants of the area including the plaintiff. It was also averred in the circumstances, the plaintiff's claim is barred by acquiescence, laches and delay. It is to be noted at para 11, the defendants averred to the issue that is central to this application now that is 'the plaintiff is not capable of use
F and enjoyment of the open space. Therefore the plaintiff did not and could not suffer any loss and damage'.

THE SUBMISSIONS OF THE PARTIES

G **[9]** In the written submission, the defendants addressed the issues that the plaintiff as a company and not a natural person could not enjoy and use the open space as follows.

H **[10]** It was submitted that the open space which the term or phrase used by the plaintiff in the statement of claim, which is not defined refers to open public place as stated in s 38(1) of the LGO. The defendants then referred to s 38(1) of the Local Government Ordinance 1961 (Sabah No 11 of 1961) which provides as follows:

I 38(1) The Authority shall have the general control and care of all public playing grounds, parks and all other open public places, other than roads and streets, and of all gardens, playing grounds, parks and other enclosed places within any urban area which have been or shall be at any time set apart and appropriated by proper authority for the use of the public or to which the inhabitants of the urban area shall at any time have or acquire a common right and the same shall be vested in such

Authority in trust to keep the same open or control the use of the same for the benefit of the inhabitants subject to any terms and conditions imposed at the time of such vesting, by the Yang di-Pertua Negeri or by any donor of such land. A

[11] It was submitted that public playgrounds, parks and such areas which are for use of the public or inhabitants referred to as open public places in s 38(1) are for the use of the public or the inhabitants. B

[12] It was further submitted that open public places such as playing grounds, gardens and parks can only be used or enjoyed by natural persons through physical usage such as walking through or sitting in such open public places. C

[13] It was also submitted that that the plaintiff being a company whilst it is a legal entity is still an artificial person and has no physical body or is unable to use or enjoy open public places. D

[14] The defendants also referred to the word 'inhabitants' in s 38(1) and submitted that by the use of the said word the section indicates that the person who can use open public places are living and natural persons. E

[15] To further support the arguments on this point, the defendants referred to the meaning of the word in *Webster's Encyclopedic Unabridged Dictionary of the English Language*, where it is stated the word 'inhibit' means 'to live or dwell in (a place) as persons or animals' and the word 'inhabitant' means 'a person or animal that inhibits a place'. F

[16] It was also submitted that from the tenure of s 38(1) of the LGO the phrase 'for the use of the public' would suggest physical usage which is not possible by an artificial body such as a company. G

[17] As regards the issue of locus standi it was submitted that s 38 does not give the public or the inhabitants any proprietary or property rights over such open public places. It was submitted s 38 provides that the authority that is empowered to control the use of open public places would be the local authority ie the Mayor or Dewan Bandaraya Kota Kinabalu ('DBKK'). H

[18] It was submitted that in the circumstances, the plaintiff has no authority or standing to take out the present action, and if there was any obstruction or interference in the use of the open public places, the party to initiate or to take up further action in this matter would be the Mayor/DBKK. I

[19] As regards the contentions of the plaintiff that it had been instructed by the authority to landscape and beautify the open public place, it was submitted that the instructions given is at best showed the plaintiff is required to do the acts as an agent of the DBKK and it did not give the plaintiff the right to sue the defendants.

[20] In response to the submission of the defendants, the plaintiff contends that there is a distinction between open space and open public places. It was submitted the open space as stated in the title deed refers to an open places within a residential area and is different from a public open place such a playground, or park or other open space reserved for the public. In the present case it was submitted that the term open public places is more apt to describe a place earmarked for recreational or leisure activities, which are readily and freely accessible to the wider community. In the present case it was submitted that the open space is surrounded by the parties' land which are residential properties. It was therefore contended that the open space was not meant for the benefit of the members of the general public. To further support the above proposition the plaintiff relied on the provision of s 28(1) of the Sabah Land Ordinance where it was pointed out that the Yang di-Pertua Negeri may reserve any state lands which in his opinion are required for any public purpose or for a residential reserve. It was submitted that the said section goes on to state that such reservation shall fully describe the land and purpose for which it is reserved and shall be conclusive evidence that the land is reserved for a public or residential purpose. It was therefore contended that in the present case since the open space is within a residential area, it was reserved as residential reserve and not intended to be an open public place.

[21] The next point of contention raised by the plaintiff is on the cause of action of the plaintiff in this case. It was submitted that the plaintiff's cause of action is premised on the tort of public and private nuisance.

[22] It was submitted that the arguments that an open public place or that the open space in the present case may only be utilised or enjoyed by natural person is erroneous by relying on s 3 of the Interpretation Acts 1948 and 1967 (Act 388) which provides a 'person' is defined to include a body of persons, corporate or unincorporated. It was submitted based on the said section a natural person would include a body corporate by statutory interpretation.

[23] In support of the above proposition, the plaintiff refers to two English cases, *Lennard's Carrying Company, Limited v Asiatic Petroleum Company, Limited* [1915] AC 705 and *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1956] 3 All ER 624; [1957] 1 QB 159.

[24] As regards the submission that open public places can only be used for activities through physical usage such as walking through or sitting in such open public places, it was submitted the argument was misconceived as the space may be used for other activities such as to act as a green lung or an area where no human activities may be carried out.

[25] It was also submitted that in the land title held by the parties, the term used is open space and not open public place as stated in s 38(1) of the LGO and hence the reliance on s 38(1) of the LGO to define the meaning of the open space is misconceived. It was further contended that the said section therefore cannot be used to limit the right of the plaintiff to enjoy the open space which is endorsed on the title.

[26] As to the defendants' contention that the plaintiff has no locus standi to sue for the loss and damage for being deprived of the use and enjoyment of the open space, it was submitted that there was no substance in the said contention. That argument is wrongly premised on the subject matter being open public place instead of open space. Section 38(1) of the Local Government Ordinance 1961 does not apply in the present case because the plaintiff is suing in its own right. The permanent obstructions created by the defendants by their illegal constructions is a form of nuisance and trespass which directly affected the plaintiff's property rights.

[27] It was further submitted that the plaintiff is entitled to remove the nuisance created or caused by the defendants. In support of the proposition the plaintiff relied on the case of *Boyce v Paddington Borough Council* [1903] 1 Ch 109, where the court held that a plaintiff has the locus to sue in respect of an alleged private right or in respect of an alleged interference with a public right without joining the attorney general as a plaintiff.

[28] The plaintiff further referred to s 2 of the Sabah Local Government Ordinance 1961 which defines 'nuisance' as follows to further support its contention that the plaintiff has the locus standi to maintain the action:

> any act, omission or thing occasioning or likely to occasion injury, annoyance, offence, harm, danger or damage to the sense of sight, smell or hearing or which is or likely to be injurious or dangerous to health or property or which affects the safety or the rights of the inhabitants at large.

[29] As for case law, the plaintiff in the written submission has referred to the case of *Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor & Another Case* [2009] MLJU 1858; [2012] 1 LNS 896, where the judge in the said case had adopted the above definitions and held that the plaintiffs as the adjoining landowners and ratepayers were entitled to sue for a public nuisance. The case involves the encroachment of an open space as well. The plaintiffs as the adjoining

landowners and ratepayers had complained about the open space being unlawfully developed into as commercial shoplot by a private developer in a joint venture with the local authority.

THE PRINCIPLES APPLICABLE IN O 33 R 2 OF THE ROC

[30] The legal principles in an application under O 33 r 2 of the ROC is well settled. For the purpose of this judgment it would suffice if I refer to the case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337, where it was stated as follows:

> Order 33 r 2 of the RHC states that the court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. The Federal Court in *Palaniappa Chettiar v Sithabaram Chettiar & Ors* [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents was upheld, that could conclude the whole proceedings and it would be unnecessary to try the other issues. In *SI Rajah & Anor v Dato' Mak Ron Kam & Ors* [1993] 3 MLJ 741, Lim Beng Choon J, after considering a large number of authorities on the ambit of O 33 r 2 and its equivalent, stated that before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations:
>
> (a) as a general rule, the court will exercise its power under O 33 r 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole;
>
> (b) an order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit;
>
> (c) preliminary points of law have been described as toe often of so-called issues of fact, the justification is even harder to discern; and
>
> (d) a preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue.

FINDINGS

[31] With the above principles in mind, I will now deal with the issues in this application. After having considered the submission, I am of the view the issue that is central and ought to be considered first is issue (b), ie the issue whether the plaintiff has the locus standi or the standing to sue the defendants. The thrust of the defendants' argument on the issue is premised on their contention that the open space is an open public place as stated in s 38(1) of the LGO. It

was submitted based on s 38(1) that the authority that is vested with the jurisdiction over the open public place is the Mayor/Dewan Bandaraya Kota Kinabalu. Based on the above proposition, it was submitted that plaintiff did not have the necessary locus standi to bring the present action against the defendants.

[32] In the written submission, the plaintiff has relied on the decision in *Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor & Another Case* [2012] 1 LNS 896, to counter the defendants' above argument.

The decision in the said case, which was submitted as had been upheld by the Court of Appeal also concerned an open space. The said case is a case that was decided after a full trial. One of the issue in the said case relates to an open space which was reserved for the purpose of a road reserve. The issue that came before the court was the contention of the parties whether the plaintiff as an inhabitant of the area has acquired common right over the public open place as stated in s 38 of the LGO. The learned High Court judge in the said case states as follows:

> 73. My understanding from the plain wording in s 38 is that the local authority shall have general control and care of the places specified therein. These places shall be vested in the local authority in trust to keep them open, care and control the use of them for the benefit of the inhabitants subject to any terms and conditions imposed at the time of vesting by the TYT or by the donor of land. The specified places include open public places, parks, playing grounds within any urban area to which the inhabitants of the urban area shall at any time have or acquire a common right.
>
> 74. In the light of my earlier finding that the area comprising of Blocks C, D and E are open space and pursuant to s 38(1) of the Local Authority Ordinance, it is my considered view that the plaintiffs as inhabitants in Bandar Sabindo have acquired common right over them.

[33] Based on the decision in the above authority, I take the view that s 38(1) does not preclude the inhabitants to take legal action in their own right, or in this case the plaintiff as it has common rights over the open space as endorsed in its land title. The issue whether it has a case that is founded on the tort of public/private nuisance or trespass would be a matter to be decided in a trial and determined based on extrinsic evidence.

This can be seen further in the judgment at p 896 when the learned judge made a finding in favour of the plaintiff in respect of an action under the tort of nuisance.

> 110. In respect of Block C and D, PW9 who is the first plaintiff, gave evidence that she bought her shop in Bandar Sabindo based on the first DP which shows that Block C and Block D of the land are reserved as open space. Now she is deprived of the use and enjoyment of the land due to the nuisance created by the first

defendants. Instead of enjoying the open space, the frontage of her shop is now facing the back of this uncompleted structure that the first defendants had put up on Block D.

111. *I am satisfied that the first plaintiff has shown that she has suffered special damage over and beyond the general inconvenience and injuries suffered by the public. For this reason, the nuisance created by the first defendants on the land comprising Block D has to be removed.*

112. In respect of Block E, there is no evidence from any of the plaintiffs to show the first defendants had created a public nuisance thereby interfering with their enjoyment of the open space in the land comprising Block E. As such, the plaintiffs have failed to prove public nuisance on the land comprising Block E. (Emphasis added.)

ISSUE (a)

[34] As regards the arguments that the plaintiff as a company is not able to enjoy and use open public place, I am of the view that there are merits on the arguments of the plaintiff that an open space may not necessarily refers to places that can only be used for activities through physical usage such as walking through or sitting in such places. The open space endorsed on a land title may also be used as a green lung area or may be reserved for other uses as may be determined by the relevant authority. In the case of *Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor & Another Case* the open space was intended for a road reserve in the area.

[35] In such a case where the open space is not reserved for use of activities such as playgrounds or parks, but reserved as a green lung area or for the road reserve in a particular area, a company in my view would be entitled to use and enjoy the open space or open public place.

It is to be noted that the provisions of s 38 are only intended to spell out the general authority over care and control of public place by the local authority and it is not merely confined to places where activities through physical usage such as walking through, playgrounds or parks as contended by the defendants. By looking at the provision of the section:

subject to any terms and conditions imposed at the time of such vesting, by the Yang di-Pertua Negeri or by any donor of such land

in my opinion shows even if the open space in this case falls within 'open public place' it is still subject to the terms and conditions of the open space at the time the general authority and care is vested with the local authority.

[36] Based on all the above reasons, I find that there is no merits in the application and, I accordingly ordered that the notice of application be dismissed with costs of RM1,500 to be given to the plaintiff subject to the payment of allocatur.

Notice of application dismissed with costs.

Reported by Jacqueleen Kho